FOR ARGUMENT

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Nos. 04-1528, -1530 & -1697

IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*, *Petitioners*,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Petitioners*,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*.

WILLIAM H. SORRELL, *et al.*, and VERMONT PUBLIC INTEREST RESEARCH GROUP, *et al.*, *Cross-Petitioners*,
v.
NEIL RANDALL, *et al.*, and VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Cross-Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS, THE CATO INSTITUTE, THE GOLDWATER INSTITUTE, THE INSTITUTE FOR JUSTICE, AND THE REASON FOUNDATION IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional pro-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

tections for political speech and association relating to elections, which lies at the very heart of the First Amendment.

The Goldwater Institute was founded in 1988 by a small group of entrepreneurial Arizonans with the blessing of Sen. Barry Goldwater. Through research and education, the Goldwater Institute works to broaden the parameters of policy discussions to allow consideration of policies consistent with the founding principles of free societies. Central to the mission of the Goldwater Institute's Center for Constitutional Government is studying the constitutional implications of campaign finance reform. The issues presented in this case are of interest to the Goldwater Institute because they involve the fundamental right of all citizens to freely participate and share their point of view in the electoral process. Proponents of increased campaign finance regulations consistently expand the class of justifications supporting limitations on core political speech. Crucial to the preservation of political speech is the renewal of a classical understanding of the robust strength afforded by the First Amendment and its narrow class of exceptions.

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. It is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between freedom of speech on the one hand and repressive government mandates on the other, and thus touches the very core of IJ's mission and ideals.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech and contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

STATEMENT

The Second Circuit in this case has sanctioned an unprecedented and radical restriction on the amounts candidates may *expend* on speech, thus cabining the actual *amounts* of speech they may generate and the *reach* of that speech. It did so on the basis of two supposedly compelling interests that are a far stretch from the interests recognized in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and a considerable stretch even from the somewhat expanded interests applied by this Court in *McConnell* v. *FEC*, 540 U.S. 93 (2003).

The two allegedly compelling interests identified by the Second Circuit are the "interests in safeguarding Vermont's democratic process from (1) the corruptive influence of excessive and unbridled fundraising[] and (2) the effect that perpetual fundraising has on the time of candidates and elected officials." 382 F.3d 97 (footnote omitted).

The court below also found such interests to be supported by the record before it, a conclusion that mistook the volume of "evidence" for its quality and relevance. The court sub-

stantially deferred to the conclusions of the Vermont legislature, rather than scrutinizing those conclusions to see whether the evidence in fact supported them. *See id.* at 97 n. 1.

While there are many things wrong with the Second Circuit's reasoning and result, this brief will focus primarily on the two interests relied upon by the court to uphold the candidate expenditure limits.

SUMMARY OF ARGUMENT

1. Under strict scrutiny, not every legitimate interest rises to the level of a "compelling" interest. Rather, compelling interests must be different in kind and magnitude from otherwise ordinary, or even important, desires to fix perceived flaws in the political system. Compelling interests likewise must be reasonably definite and have some manageable stopping point, otherwise the limits imposed by strict scrutiny will be diluted to the point of being meaningless. Strict scrutiny likewise requires an independent and meaningful review of the facts alleged to support any claimed compelling interest. Even in the less-scrutinized area of commercial speech, this Court analyzes the facts to ensure that the claimed interest is real and not conjectural. It should be even more diligent under strict scrutiny of direct limits on candidate speech.

2. Vermont's alleged interest in combating the supposed influence and access derived from modest and limited contributions does not involve corruption and is neither compelling nor supported by the evidence. Our representative democracy necessarily involves the exchange of political support for official action. Such support comes in many forms, and legitimately includes at least limited campaign contributions that can only be used for speech. While extreme or coercive influence from large contributions may exert "undue" influence over an office holder, the influence that comes from more limited political contributions *per se* is not illegitimate. While equality in voting is protected at the ballot box, perfect equality of influence in the legislature is not the measure of

whether the system is corrupt. The absence of such egalitarianism is not a threat to legislative processes, which are already protected by numerous checks against undue influence, and is not compelling either in kind or in magnitude in this case. Furthermore, Vermont's egalitarian interest is neither supported by the evidence, nor is its solution narrowly tailored.

3. Vermont's alleged interest in "protecting" candidate time so that it may be reallocated to official duties or to speech activities that Vermont prefers over campaign solicitation and spending is neither compelling nor supported by the record. Saving time for official duties as an interest both proves too much and too little. It would justify a host of other restrictions on office holders, yet it offers no justification for restricting challengers whatsoever. Vermont's lack of direct efforts to require office holders to perform their jobs also undermines the genuineness of the interest and Act 64's failure to require that freed time be reallocated to official duties suggests that it will not in fact serve the claimed interest. As for reallocating time between different forms of campaign speech – solicitation and media buys versus personal voter interaction – that interest is simply invalid, as it is up to speakers and listeners to decide how best to speak, not up to the State. And as for the evidence relied upon by Vermont and the Court below, none of it shows that fundraising actually diverts time from the activities Vermont prefers, as opposed to other activities, or that lower spending would reallocate candidate time as Vermont imagines.

ARGUMENT

I. Strict Scrutiny Requires a Narrow View of Compelling Interests and a Critical Review of the Facts Claimed To Support Such Interests.

A. There Are Few Genuinely "Compelling" Interests.

If the current strict scrutiny paradigm has any meaning at all, then presumably the demand that the government establish a "compelling" interest, as opposed to merely "valid" or "important" interests, creates some *meaningful* hurdle that an asserted interest must overcome. That is simply a necessary corollary to the existence of strict scrutiny in the first place. A compelling interest thus should be different in both kind and magnitude from the otherwise broad range of interests that might support government action under lesser scrutiny. Interests that are "too amorphous" or "indefinite[]" or that have "no logical stopping point" are not compelling and would provide far too much leeway for regulation in areas most strongly protected by the Constitution. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (plurality) (lack of compelling interest for racial classifications).

B. The Facts Establishing Any Compelling Interest Must Be Critically and Skeptically Reviewed.

As this Court has held, appellate review of facts in a First Amendment case must be independent and must guard against the manipulation of the facts to circumvent the protections afforded to speech. *See Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). Indeed, this Court has consistently turned a skeptical eye to legislative findings in support of speech restrictions, even in the less-scrutinized context of commercial speech. *See, e.g., Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 188, 192 (1999) (government must demonstrate the "'harms it recites are real,'" not "'mere speculation or conjecture'"; failure to take non-speech regulatory action to address alleged inter-

est undermines asserted interest) (citation omitted); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (inconsistencies and exceptions in the regulatory scheme undermined asserted government interest).

While this Court occasionally has given greater leeway to legislative findings in the context of *contribution* restrictions – seemingly because the speech-value of contributions have been considered slight and the level of scrutiny is accordingly relaxed – there is no justification for importing such leeway into genuine strict scrutiny of candidate expenditure limits, which directly cap the amount and scope of candidate political speech. Instead, this Court should insist, as in the commercial-speech context but with greater vigor, that the harms asserted by the State are "real," not "conjecture," and that they in fact flow from the activity being restricted.

While the court of appeals purported to review the facts independently and meaningfully, it significantly diluted its factual scrutiny in this case and often expressed inappropriate deference. For example, it endorsed the district court's "'considerable deference' to the legislative findings on the need for the law," and cited favorably to Justice Breyer's concurrence in *Shrink*, which suggested deference to the legislature's "'political judgment.'" 382 F.3d at 113 (citations omitted). The court of appeals likewise did "not question the validity of the factual findings developed by the legislature in support of Act 64,[]" and erroneously placed upon the plaintiffs the burden of producing "competing evidence" rather than accepting for itself the duty to skeptically review the legislature's "findings" from the outset. *Id.* at 114 (footnote omitted). But it is the State's burden to establish its interest, and where a critical review of the State's evidence is sufficient to undermine the State's conclusions, a compelling interest has not been established, notwithstanding whether plaintiffs proffered *evidence* rebutting the State's speculative or incomplete findings. *Cf. Celotex Corp.* v. *Catrett*, 477

U.S. 317, 323 (1986) (no need to proffer evidence to overcome a party having, yet failing, the burden of proof).

II. The Claimed Corruption Interest Used To Support Expenditure Restrictions Is Neither Compelling Nor Supported by a Proper Review of the Record.

Corruption, like "torture," is a particularly loaded term that suggests a severe breach of duty incompatible with our political system. For the concept of corruption to carry the moral and legal weight it has acquired and to constitute a "compelling" interest, it cannot possibly encompass practices that are merely unfair or inequitable, but must be limited to a narrow class of extreme deviations from acceptable political practices. To expand the notion "corruption" to include every perceived unfairness is to empty the concept of meaning.

In this case, Vermont's interest amounts to little more than promoting an unreachable egalitarian ideal of *equal* political influence, not combating corruption properly defined. While such a quixotic goal may be permissible, and may even be laudable in a naïve sort of way, it is not compelling.

Disparities in influence are an inherent result of freedom in both politics and the economy and cannot be eliminated without also eliminating the very freedom that makes them possible. Attempting to eliminate all such disparities – rather than simply the most severe and extreme ones – is an endless task at odds with our constitutional system. While eliminating the effects of "large" contributions resulting in grossly "undue" influence may relate to a plausibly limited notion of corruption, eliminating every minor disparity among political actors of different strength, wealth, and motivation is nothing short of a radical repudiation of the very freedoms that allow such disparities to exist. Such a goal is not related to corruption and is not a compelling interest.

A. The Proper Role and Means of "Influence" in Our Constitutional Democracy.

To understand and cabin the notion of corruption, it is essential to reflect on what this Court has already considered corrupt and what sorts of influence are necessarily proper or "due" given the essential predicates of our democracy.

Since *Buckley*, *quid pro quo* arrangements of campaign cash for legislative action have been considered corrupt. The corruption rationale, however, has also been expanded to include the "'undue influence on an officeholder's judgment, and the appearance of such influence'" stemming from large campaign contributions. *FEC* v. *Beaumont*, 539 U.S. 146, 156 (2003) (citation omitted). The rationale has also encompassed the influence exerted by supposedly illegitimate political actors, such as corporations and labor unions, who may parlay government-conferred "special advantages" for acquiring wealth into "an unfair advantage in the political marketplace" and who may act "as conduits for circumvention of [valid] contribution limits" by corporate owners or employees. *Id.* at 155-56 (citations and quotation marks omitted).[2]

But even accepting such a view of corruption as a given in this case, this Court still must find some limit on the more nebulous aspects of corruption if the core of the First Amendment is to retain any significance. In particular, the notion of "undue influence" is a bottomless pit absent some coherent baseline of what amount or type of influence is "undue" and what influence is simply part of the ordinary democratic process. *See* Jaffe, McConnell *v.* FEC: *Rationing Speech*

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[2] The problems with such an expanded notion of corruption have been catalogued by these *Amici* in prior submissions to this Court. *See* Brief of *Amici Curiae* Center for Competitive Politics, *et al.*, *Wisconsin Right to Life* v. *FEC*, No. 04-1581 (Nov. 14, 2005); Brief of *Amici Curiae* Cato Institute and Institute for Justice, *McConnell* v. *FEC*, Nos. 03-1674 & consolidated cases (July 8, 2003).

to Prevent "Undue" Influence, 2003-2004 CATO SUPREME COURT REVIEW 245, 295-96 (2004).

The first question for this Court, therefore, is what types and degrees of influence are proper or at least acceptable in our constitutional system and what types deviate so far from such a baseline as to be deemed "corrupt."

The basis for a distinction between proper and improper influence over elected officials necessarily starts with the recognition that democracy in general, and elections in particular, are, by definition, an exchange between candidates and the citizens that elect them. The exchange of *elective office* for desired *official conduct*, and the influence over government officials that such an exchange necessarily creates, are the essence of representative democracy and neither the exchange nor the influence can be characterized as improper.

Our constitutional democracy also relies on the core premise, endorsed through the First Amendment, that politicians and the public will be influenced not merely by periodic voting alone, but also by the political speech of competing interest groups and individuals. What Vermont disparagingly refers to as an "arms race" is in fact a *speech* race, with the goal of persuading voters of competing positions. That such speech is more efficiently and effectively conducted through means that cost candidates money, rather than simply their own or their supporters' time, does not change the fact that the sole use of such money is on speech. Providing financial resources for candidate speech is thus no different, or less valid, than providing personal support for such speech, other than that it is more efficient and effective at helping candidate speech reach the public. Contributions thus are not "arms," they are merely vehicles for speech. And insofar as facilitating such speech, like every other form of political support, may provide some influence to the facilitator, it is simply part of the inherent and proper democratic political exchange.

This Court, however, has deemed the existence of certain types of "undue" influence to be corrupt, which seems to suggest influence out of proportion to the person or group wielding it. The notion of "disproportional" influence, however, begs the question of how much influence any given person or group *should* have in some idealized construction of the world. While each person has only one *vote*, and hence has limited influence in that sense, we have never imagined that the *speech* of each person or group should be equally influential or that the views of politicians should be based solely on broad opinion polls.

Speech having unequal influence on the public, and hence unequal value to candidates, comes in many shapes – speech by the media, speech by celebrities, speech by religious leaders, and speech by the economically successful. Whether through differences in access, quantity, or credibility, the impact of speech necessarily will vary. But the falsely egalitarian notion that the speech of persons and groups *ought* to have influence in strict proportion to the voting strength of the speakers fundamentally misunderstands the principles and predicates of the First Amendment.

In light of such protected means of influence, the disparagement of "special interests" by Vermont and others makes no sense. While such groups may focus their resources on narrow issues, and gain influence from such concentrated attention, such influence is hardly "undue." People routinely focus their energies on what matters most to them, and tend to have influence correlated to the energy invested. That is the nature of *all* interests in a democracy, "special" or otherwise.

Indeed, if anything, a proliferation of relatively narrow and competing interests was a central and important assumption of the Framers and a key aspect of the checks and balances of our Constitution. Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45

(Rossiter & Kesler eds., 1999). He also recognized that faction was the inevitable result of freedom and could only be eliminated "by destroying the liberty which is essential to its existence," which would be a remedy "worse than the disease." *Id.* at 45-46 Madison's solution to the danger of faction was not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Any supposed concern with "special" interests thus misunderstands the entire problem of faction. Far from being compelling, a desire to decrease special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52.

Just as the influence exerted by special interests is a natural and acceptable aspect of democracy, campaign contributions are likewise entirely valid means of providing political support, even if such support results in some degree of access or influence. Indeed, this Court has never said that *any* value placed by a candidate on *any* level of contribution is "undue" or "corrupt." Rather, this Court has limited "corruption" to the influence exerted by *large* contributions. *See McConnell*, 540 U.S. at 95 (idea that "large contributions" can corrupt not novel); *Buckley*, 424 U.S. at 26 (danger from "large contributions"). To suggest that all money in politics – even limited contributions used only for speech – is corrupting is to radically depart from the notion of policing "large" contributions, and would eliminate virtually any possibility of "freedom" of speech in a world where "effective political speech" necessarily costs money. *See Buckley*, 424 U.S. at 19.

Finally, to the extent the provision of political support – whether through contributions, direct political speech, or the donation of time to a campaign – is partly a function of wealth, such differential capacity for support does not render any influence deriving therefrom "undue" or illegitimate. Indeed, *Buckley* correctly recognized that government may not "restrict the speech of some elements of our society in order

to enhance the relative voice of others." *Id.* at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 48-49. Manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

B. Equalizing Personal "Access" to Candidates and Office Holders Is Not a Compelling Interest.

The supposed corruption interest relied upon by the Second Circuit in this case is a far cry from the corruption interest recognized by this Court. There is no *quid pro quo* interest asserted here, and there are no "large" contributions involved given the contribution limits imposed by Vermont. Such limits are precisely the solution to "undue" influence sanctioned by this Court, and appropriately low limits (coupled with means to prevent their circumvention) serve to eliminate – or at least reduce to a non-compelling level – the risk of corruption. And there is no threat from illegitimate political actors in that it is the candidate's expenditures being limited and all contributions are from individuals or PACs.

Instead, Vermont is claiming the novel interest in avoiding reliance on contributions of *any* amount because it deems any marginal influence or access from even modest contributions to be "undue." The problem, supposedly, is that uncapped spending makes contributions desirable to candidates, that candidates thus will "sell" access to contributors, and that those who contribute, or at least contribute at the top of the limits, will receive preferential access relative to those who contribute less or not at all.

Vermont's interest thus boils down to a desire to mitigate relatively minor disparities in access thought to be a result of differential contributions within a system that already limits contributions to modest non-corrupting amounts by Ver-

mont's own reckoning. Such relatively minor disparities in access may be considered unfair, and may be alleged to create some un-measurable degree of distortion in the system, but they hardly constitute "corruption." The desire for more egalitarianism in political *influence*, beyond the existing egalitarianism in actual voting, may be permissible and may or may not be laudable, but it does not entitle Vermont to equate any deviation from some egalitarian ideal with "corruption." Indeed, the problems with such an expansive notion of corruption are myriad.

First, this Court has refused to adopt such a wholesale indictment of contributions *per se*, and has repeatedly recognized that contributions to candidates are valid – and protected – means of expressing political support and engaging in political association. *See Buckley*, 424 U.S. at 23, 24-25. Insofar as such valid support and association translates to some added influence on a candidate, such influence is likewise valid and cannot, *ipse dixit*, be deemed "undue." Any disparities in the ability or willingness of people to give contributions is not at all incompatible with our constitutional system. "Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) ("*MCFL*").[3]

Second, Vermont focuses solely on minor economic aspects of disparate influence, as reflected in differential contributions, while ignoring the far more substantial disparities in political influence generated by wealth, celebrity, occupation, ability and willingness to donate time, and a host of other fac-

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[3] That this Court does not view mere disparities in influence based on financial means to be corrupt can be seen in its refusal to consider the poor a "suspect" class. If the corruption of the legislative process were as bad as Vermont says, one would think the products of that corrupt process would receive heightened scrutiny. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). That they do not suggests the absence of meaningful "corruption" and the lack of a compelling interest.

tors unrelated to the voting strength of individuals. But such disparities in wealth and other resources that can enhance political influence are the inevitable consequence of a free society and a relatively free economy, and there are good practical and policy reasons for accepting such disparities. To the extent such other more significant causes of disparities in access and influence remain, one must question the genuineness of Vermont's interest and ask why contributions are a uniquely illegitimate means of competing for such influence.

Is it more equal to give access to a celebrity or an interest group whose members devote their time, rather than money, to a candidate's campaign? Insofar as the ability to make a contribution gains access for persons lacking in time or ability to engage in such other means of political support, money becomes an equalizer, not a source of undue preference.[4]

Third, to the extent that Vermont is arguing that contributors gain access over non-contributors, the question is why it matters from a systemic perspective. It would seem to matter only if the opinions of non-contributors are not heard. Given that legislators will never have the ability to hear from *every* constituent on *every* issue, they necessarily depend on proxies who collectively can express the views of larger groups of constituents. Vermont's alleged interest seems to suggest that those who cannot give lack proxies and will not have their views expressed by those who can and do give. That assumes

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[4] There is no meaningful difference between a supporter contributing $400 which is then used to hire a canvasser and that same supporter volunteering as a canvasser himself. While a cash contribution may be a more *efficient* means of adding value for a supporter with little spare time but highly marketable skills, the value to the candidate is the same. To indict the use of cash but not time as a means of supporting a candidate is to indict the free-market notions of specialization and efficiency without explaining why influence derived from *either* form of support is "due" or "undue." Any inevitable differences between the degrees of support different persons are willing or able to give – either in cash or in kind – are at least severely limited in the context of cash contributions.

that contributors, as a group, hold different views than non-contributors. While that assumption is questionable, the fact that it underlies, in part, Vermont's interest demonstrates such interest is based on content and viewpoint, and that Vermont seeks to limit the influence of disfavored viewpoints.

Finally, the means by which Vermont has chosen to address the supposed problem cast serious doubt on its existence. While the alleged problem turns on the influence gained through contributions, Vermont has not chosen to ban such contributions, or further lower them to the point where they are not a threat at all, but rather has chosen to limit the *expenditures* – and hence the amount and scope of speech – of candidates as a means of supposedly reducing the *value* of contributions. But any such reduction in contribution value is at the margins at best, and so long as money is required for speech, contributions will be valued by candidates. That Vermont is thus willing to tolerate the continued supposed inequities among contributors and non-contributors, at largely the same levels as existed prior to Act 64, suggests that the interest it alleges is not particularly strong or pressing.

C. The Record Does Not Support a Significant Danger of Undue Access.

Notwithstanding whether Vermont's interest involves "corruption" or is theoretically compelling, the evidence relied upon by the Second Circuit simply does not support the notion that uncapped candidate *expenditures* in the context of already limited *contributions* even implicates that interest. Whatever interest exists in limiting improper preferential access is largely cured by contribution limits and whatever risk remains, if any, is so attenuated and minor as to constitute no genuine danger whatsoever.

The evidence recited by the court of appeals overwhelmingly relates to the dangers posed by *large* contributions, not by expenditures of the candidates themselves. For example, the court of appeals endorsed the district court's finding "'that

large contributors often have an undue influence over the legislative agenda.'" 382 F.3d at 116 (citation omitted) (emphasis added); *see also id.* at 117 (reliance on fewer "larger contributors"); *id.* at 118 n.12 ("large sums"); *id.* at 104 (discussing the supposedly "widely-held public view that donations *in excess* of the Act's limitations were suspicious") (emphasis added). Missing is any evidence of a relationship between uncapped expenditures and any increase in corrupting influence of already limited contributions.

While the court of appeals recognized the obvious disconnect between evidence relating to large contributions and the restrictions imposed on out-of-state contributions, *id.* at 105 (record only supports inference that out-of-state "contributions raise the risk of corruption when they are large – a problem solved by the contribution limits"), it failed to recognize the same disconnect as to candidate expenditures derived solely from limited contributions.

Alleged "Undue" Influence of Special Interests. Generic suggestions that the need to raise money gives influence to interest groups likewise fail to show corruption at all, much less tie it to candidate expenditures above the expenditure ceilings imposed by Vermont. The Second Circuit's reference to "studies showing how the pressure to raise money made legislative initiatives less likely to succeed if contrary to the wishes of well-organized interest groups who frequently contribute to candidates," *id.* at 103, falls far short of establishing that such pressure, if even a function of contributions at all, are caused by candidate spending *above* Vermont's spending cap, as opposed to the need to compete for political and financial support even below the cap. And the evidence certainly does not distinguish between the influence such groups have as a function of numerous supporters, more strongly motivated members, and superior political organization from influence obtained through meager contributions.

Even where interest groups elect to "bundle" the limited individual contributions of their members or supporters, such

bundling is no more than ordinary free association, produces a net contribution tied precisely to the degree of individual support behind the "interest" represented by the bundler, and hence can hardly be deemed any more "undue" than a single contribution within Vermont's limits. *Cf. MCFL*, 479 U.S. at 258 (resources aggregated by a corporate PAC "in fact reflect popular support for the political positions" of the PAC). That individuals choose to act together to demonstrate the depth and breadth of support for an interest is the very point of the freedom of association in the first place, and is not corrupt.

Alleged "Undue" Influence of Contributors Generally. Once contributions are limited to the low per-person levels set by Vermont, there is absolutely no evidence that the *marginal* differences in amounts between contributors, or between contributors and non-contributors, results in any *undue* access or influence. Certainly there is no evidence that access to candidates is exclusively, or even significantly, a function of cash contributions. And basic common sense suggests otherwise. For example, if the non-contributing citizen was a major employer, that person would have a greater prospect of access than the lone citizen contributing a measly few hundred dollars. Likewise with newspaper reporters or editors, community leaders, campaign workers, or even family friends. It is quite novel, to say the least, for Vermont to suggest that whatever access comes from a relatively meager contribution once every two years is "undue" relative to the access that flows from myriad other considerations.[5] And even as between otherwise similarly situated citizens, there is no evidence that the larger contributor has significantly different

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[5] *See* Stephen Ansolabehere and James M. Snyder, Jr., *Why Is There So Little Money in U.S. Politics*, 17 J. ECON. PERSPECTIVES 105 (2003) (examining 36 published, peer reviewed studies on effects of money in U.S. politics since 1981, and concluding that "the evidence that campaign contributions lead to substantial influence on votes is rather thin • • •. Money has little leverage because it is only a small part of the political calculation that a re-election oriented legislator makes.").

access to candidates (or even much access at all) or that such marginal comparisons are a significant phenomenon at all.[6]

The utterly marginal comparisons offered by Vermont involve trivial differences in influence in the context of the full range of influences that exist on a candidate, and minor disparities in contributions have not been shown to be a significant factor in overall access to candidates. Having eliminated any coercive influence of large contributions, any remaining influence of small contributions does not establish a compellingly harmful kind or degree of influence.

Alleged Harms from Uncapped Expenditures. The evidence in this case likewise does not support the notion that total candidate spending, and particularly spending *above* the expenditure limits set by Vermont, has any effect whatsoever on the supposedly corrupting potential of limited contributions. At a minimum, it seems self-evident that, absent spending caps well *below* the amounts spent on recent Vermont campaigns, expenditure limits will have no conceivable connection to the *existing* and supposedly "undue" influence of contributions. Because Vermont selected spending limits designed to match past spending, 382 F.3d at 129-30, it seemingly has no interest in eliminating existing undue influence.

And even if Vermont's expenditure caps are below the hypothetically larger amounts to be spent on future campaigns, neither evidence nor logic suggests that increased campaign spending increases the influence of larger contributors over smaller ones. Rather, increased spending would force candidates to broaden their appeal beyond the limited number of maximum donors, whereas spending caps would

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[6] Even the very notion of preferential access seems absurd in most situations in Vermont. Assuming that a House member in a race already costing less than $2000 would indeed give any meaningful preference to a $200 donor as opposed to any of the merely 1000 voters needed to win election, 382 F.3d at 130-31; 118 F. Supp.2d at 471, such a donor – or ten of them – would hardly monopolize two years of the official's time.

accordingly *reduce* the necessity for smaller donors and have *no impact* on the level of influence of non-contributors. Future increases in total spending would seem to progressively decrease the value of even maximum contributions as they became smaller and smaller percentages of the total funds needed. Any individual or group, therefore, would have progressively less importance as a donor, and what would begin to matter more would be significantly expanding the *pool* of donors, not merely appealing to a select few.

Whatever marginal differences in access might be thought to come from differential contributions thus has nothing to do with the *size* of campaign expenditures, but rather with the fact that candidates can spend *any* money from contributions, thus giving those contributions value. That Vermont continues to allow spending at past levels is powerful evidence that Vermont does not actually believe that contributions below the amounts set in Act 64 are corrupting and that the Act's real interest is to limit the *amount* of speech by candidates.[7]

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[7] There is ample reason to be suspicious of the motives of Vermont's incumbent legislators in limiting the amount of candidate speech. One generally accepted lesson that has emerged from academic research on campaign finance is the notion of the declining marginal utility of dollars used on speech. After a certain level of spending, the utility of further spending declines. Incumbents, being better known to start, hit the point of declining marginal utility more rapidly than challengers. This point is not really controversial among empirical researchers. *See, e.g.*, Gary C. Jacobson, *Enough is Too Much: Money and Competition in House Elections, in* ELECTIONS IN AMERICA (Kay Schlozman ed., 1987) ("with the challenger's level of spending controlled, the effect of the incumbent's spending is, in virtually every model or election year, very small and statistically indistinguishable from zero."); John R. Lott, Jr., *Brand Names and Barriers to Entry in Political Markets*, 52 PUB. CHOICE 87 (1986); Steven D. Levitt, *Using Repeat Challengers to Estimate the Effects of Campaign Spending on Election Outcomes in the U.S. House*, 102 J. POL. ECON. 777 (1994). The incentives for incumbents in the legislature to set spending limits at a point above their own threshold, but below the threshold of challengers is thus tremendous. An example of such self-dealing was seen in the proposed voluntary spending limits included by Congress in the

Alleged Harms to Public Perception. Finally, a few words on the public perception evidence. The court of appeals accepted public opinion polls suggesting a dim public view of Vermont's elected officials and concluded that that constituted a constitutionally significant loss of confidence in democracy. 382 F.3d at 116. But the fact that the public may respond to leading questions and characterize disfavored behavior as "corrupt" should not be sufficient to establish a constitutionally meaningful appearance of corruption. Particularly where there is no evidence of actual corruption, the proper response to such opinion is to correct the misperception, not to restrict speech. Otherwise, were mere public opinion enough to justify overriding the First Amendment, it would effectively eviscerate the very purpose of a Bill of Rights, which "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943).

This Court should instead insist on more meaningful indicia that the public believes certain practices are corrupt. For example, has it led them to change their votes for candidates for office? Has any candidate ever gained meaningful support by refusing to take contributions? The only evidence in that respect is the collapse of Vermont's voluntary expenditure limits because they had no electoral benefit to candidates. It would seem that while the public will tell a pollster that certain candidates are corrupt based on contributions and expen-

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1997-98 iterations of McCain-Feingold and Shays-Meehan. Evidence from three election cycles demonstrated that when challengers spent below such proposed levels, incumbents had an overwhelming advantage. Bradley A. Smith, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 69 (2001). There is no reason to think that Vermont legislators were any less self-serving in setting the limits in Act 64, or that the 10-15% differential in incumbent versus challenger spending limits is sufficient to overcome the inherent benefits of incumbency.

ditures, they do not appear to genuinely believe it, as evidenced by their actual voting patterns.[8]

D. The Genuineness of Vermont's Interest Is Doubtful Given Its Failure To First Try Non-Speech Solutions and the Radical Underincusiveness of Its Chosen Remedy.

If Vermont were genuinely concerned about such underlying economic disparities, and their ripple effects throughout all portions of society in which money plays a role, Vermont could address the problem at its source without the slightest impact on First Amendment rights – it could equalize income and wealth through taxation and redistribution. Alternatively, it could provide a tax deduction or even a direct tax *credit* for all contributions to candidates, perhaps with an aggregate cap on the total contributions each person could make in any election cycle. While those might be unpalatable and problematic solutions for many reasons, they would impose no burden on *First Amendment* rights, and hence would be a far less restrictive means of accomplishing such a goal. That Vermont has not done so suggests that its interest in equalizing influence that is a function of wealth is of questionable genuineness.

Furthermore, on Vermont's own reasoning, the remedy it has selected is wildly under-inclusive as its alleged interest extends well beyond candidate spending. Vermont's theory,

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[8] Indeed, public confidence or views on corruption seem to have little to do with campaign finance at all. *See* Nathaniel Persily and Kelli Lammi, *Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 152 (2004) (concluding on the basis of extensive empirical research that "Americans' 'confidence in the system of representative government' – specifically, their beliefs that government officials are not 'crooked' and that government is 'run for the benefit of all' – is, to a large extent, related to their position in society, their general tendency to trust others, their philosophy as to what government should do, and their ideological or philosophical disagreement with the policies of those in charge.")

flawed as it is, seems to argue that preferential access available to contributors generally, and to large contributors over smaller contributors, stems from elected officials' need for large amounts of campaign funds and hence the high value of contributions (and especially maximum contributions) given such demand. Expenditure limits, so the theory goes, would limit the demand for, and hence the value to elected officials of, campaign contributions.[9] (How such a limited decrease in the *overall* value of contributions would alter the *differential* value between large and small contributions is never explained.)

What is unusual about this theory is that the corruption linkage applies only to incumbents, not challengers, and could be solved by a rule applicable only to incumbents or even by single-term limits for holding office. In any event, Vermont applies its limits to challengers as well as incumbents presumably out of some sense of fair competition – self-serving and non-compelling as that rationale may be. That logic extends even to a self-financed challenger. Even though such a challenger cannot corrupt himself nor needs to rely on contributors or give them any preferences, his spending would presumably pressure the incumbent to favor contributors in order to compete. Thus, in order to stop the potential corruption of incumbents, Vermont has restricted the core and utterly harmless speech of wholly innocent challengers. As radical as that result is, Vermont's theory goes further.

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[9] Vermont's expenditure limit measure would not by itself lessen a candidate's *demand* for cash, particularly if the candidate is a challenger, unknown, or unpopular with the media. Rather, the candidate is simply disabled from satisfying that demand and would correctly feel that Vermont has tied her hands and limited her right to speak on her own behalf with such resources as the contribution limit regime would otherwise allow her. Hence we see, as noted by Judge Winter in dissent, the spectacle of a sponsor and coauthor of Act 64 who has now filed to declare his own legislation unconstitutional. *See* 382 F.3d at 158.

Capping the spending of opposing candidates will not by itself serve the interest claimed because Vermont presumes, erroneously, that the pressure on a candidate to solicit additional contributions comes only from the fundraising prowess of her opponent. But a wealthy *individual* could run an independent ad campaign for a challenger or against an incumbent, and that too would force the candidate to solicit additional contributions, or suffer the "unfairness" of being unable to respond. To relieve this pressure and unfairness, as in the case of challenger spending, Vermont would presumably have to limit the independent expenditures of all wealthy individuals in Vermont, a still further radical departure from precedent, but no less related to the alleged interests here than what Vermont has already done. Similar reasoning applies to independent spending by PACs; to spending by MCFL corporations; or to a program, editorial, or story running on a Vermont television, cable, or radio station or in any of several newspapers. Each of those sources could generate the same pressure on an incumbent to respond and to solicit contributions for that purpose; and if such further spending were forbidden, to ask that the opposing entities likewise be limited in their expenditures in the name of fairness, as some academics have suggested. *See* Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999) (egalitarianism requires reconsidering the media exception to otherwise applicable campaign finance laws); Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1252 (1994) (proposal to treat media enterprises the same as are other corporations under campaign finance law).

Even viewing the interest and remedy in a light most favorable to Vermont, it cannot be achieved unless the Court would countenance many such measures in the future. That is the implication of Vermont's alleged interest, and it is a radical departure from First Amendment jurisprudence indeed. And while past restrictions in the campaign finance area de-

pended on a nexus between the practice being restricted and an office-holder, Vermont would stretch the notion of such a nexus to include anything or anyone to which an office holder felt the need to respond via costly speech, thus driving the need to raise money to respond. The breadth of Vermont's interest thus goes far beyond the already remarkable breadth of Act 64. That should cause this Court to reject enshrining such an interest as "compelling" and thus inviting such expansive restrictions in the future.

In sum, there is no existing relevant precedent that would not be radically altered or jettisoned if the Court were to uphold this measure. Vermont is free to experiment with the dollar values of its contribution limits and the anti-circumvention measures previously recognized by the Court to reach a proper balance. To uphold expenditure limits, however, would be to enshrine monetary equality as a constitutional maxim and to subject all politics to government control. But such a result is neither wise nor necessary because money is not an illegitimate resource in the political marketplace, even where its deployment is not always equal.

III. The Claimed Interest in Reallocating Candidate and Office-Holder Time Is Neither Compelling Nor Supported by a Proper Review of the Record.

Vermont's purported interest in "'assur[ing] that candidates and office holders will spend less time on fundraising and more time interacting with voters and performing official duties,'" 382 F.3d at 120 (citation omitted), is peculiar, at best, in that it places the State in the role of arbiter of which competing First Amendment activities – solicitation and advertising or personal voter interaction – are valuable and permissible for candidates, yet it does nothing to "assure" that candidates will actually spend any of their newly "protected" time on such preferred speech activities or on official duties.

It would appear, therefore, that Vermont simply dislikes the nature of modern political communications that rely heav-

ily on broad, though perhaps less personal, appeals and advocacy, and thus wishes to suppress them to some degree, regardless of what replaces them. Such an interest in suppressing disfavored modes of speech or in reallocating such speech as occurs is neither compelling, nor supported by the record.

A. Reallocating Candidate and Office-Holder Time Spent on First Amendment Activities Is Not a Compelling Interest.

Of the several aspects of Vermont's alleged time-protection interest, the notion of protecting office-holder time is simultaneously appealing and non-compelling. It is appealing in that there is undeniably a legitimate interest in having office holders spend all necessary time on their official duties. But it is not compelling in a number of ways.

First, it is, at best, nebulous and knows no bounds. Office holders have a variety of competing demands on their time, each of which may keep them from attending to their official duties to an optimal degree. Family demands, business interests, social engagements, or the mere desire to play golf all take time that might otherwise be spent on official duties. Likewise, the demands of campaigning, in whatever form or mode, will compete with an office holder's official duties, and it is inevitably the hard choice of the public official to decide whether his reelection chances are best served by spending time improving his performance in office or by campaigning for another term in office. If the interest in having office-holders spend more time on their duties were indeed *compelling*, it would seem to justify any number of regulations of anything that might compete for an office holder's time. Restrict family life or marital status? Why not, if the interest is truly *compelling*? Ban or severely restrict their *time* spent campaigning? That is certainly the next logical step. Indeed, given that Vermont claims to be concerned with the "arms race" to which office holders must respond, why not cap third-party independent expenditures as

well, especially on legislative issues, given that office holders would need to respond to such speech and hence be distracted from their duties. The alleged interest thus proves too much, and hence is far too general to be a compelling interest that can justify restrictions on core speech.

Second, the interest in official duties also proves too little to serve as a justification for Act 64. At a minimum, it plainly does not apply to spending by challengers not already holding state office. Their time will not go to official duties regardless, and hence protecting it seems rather meaningless. While it is true that a one-sided restriction on incumbent fundraising might seem unfair, any real unfairness is hardly self-evident given the inherent advantages of incumbency. That an office holder's job may constrain the time spent raising funds and campaigning for reelection seems to be a simple consequence of having assumed the greater duties of office, and should not be bootstrapped into a reason for restricting the speech of challengers. Intervening in the inherent balance of advantage and disadvantage as between challengers and incumbents in the name of "fairness" is quite a different interest, hardly seems compelling, and is distinctly *not* a task to be trusted to the incumbents themselves.

Third, while having office-holders perform their duties is a legitimate concern, the fact that Vermont has not taken more direct steps to accomplish that goal would seem to undermine its strength and the genuineness of Vermont's concern. Vermont could have done what every employer does with similar concerns – impose work hours and other obligations, require office holders to spend time at the state-house, require them to hold "office hours" for constituent service, and forbid them from conducting non-official business during working hours. While that seems rather heavy-handed, it is certainly less restrictive of First Amendment rights, however much it might bruise the sensibilities of elected officials.

Fourth, simply freeing up office-holder time offers no assurance that the time will indeed be spent on official duties as

opposed to anything else. That lack of assurance again undermines the genuineness of the interest, or at best converts it into the far more attenuated interest of giving office holders the *option* to spend more time on their duties. Furthermore, given that the means by which Vermont has approached this interest – limiting the most efficient means of communicating with large audiences of voters – office holders wishing to recoup some of the lost effectiveness of their campaign speech may in fact have to spend *more* time campaigning, and less time on official duties. The contradictory claimed goals embedded in this alleged interest thus lead one to question whether either goal is genuine.

As to the second aspect of the time protection interest – reallocating time to more desirable forms of personal political speech – Vermont's interest is affirmatively invalid.

First, this interest, of course, has nothing to do with the total time a candidate spends on speech, but rather with channeling a candidate toward a particular *type* of speech and away from solicitations and 30-second ads. But deciding what type of speech is best, either for candidates or for voters, is reserved for the speakers and the listeners themselves, and the claimed interest in overriding those choices is no interest at all. *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.").

Second, the interest, once again, knows no limits and hence would sweep too broadly to fit within the scheme of strict scrutiny. If the State can choose between solicitations coupled with television time and personal interaction by the candidate, there seems no reason it cannot decide that voters really need direct debates, and require that of candidates as well. Or perhaps the State could decide negative campaigning is not valuable and could ban, or severely burden, such speech. At bottom, an interest in deciding what speech is best

for candidates or the public is simply a rejection of the First Amendment on its face, it is not a cause to override it.

Third, the interest in reallocating speech is particularly non-compelling where the State disfavors methods of speech that the candidates themselves find most efficient and effective and forces candidates into speech that will not work as well or reach as far. That suggests that the State is actually trying to suppress the total quantity and reach of speech, to the detriment of the public that will now receive less speech, and to the detriment of challengers, who, as discussed earlier, reach the point of declining marginal utility of speech later than incumbents, and who require substantially more speech to overcome the advantages of incumbency. Notwithstanding the State's protestations that direct interaction with voters is superior and inspires confidence, that judgment is for the voters and candidates themselves, and to the extent any incumbent actually believes it, she can try it voluntarily in an election. The fact that few if any seem to have done so – recall the abandonment of voluntary spending limits – suggests that the legislators do not believe their own alleged interests.

Finally, reallocating candidate time away from more costly, yet more effective, forms of communication simply cedes the playing field to third parties with access to such communication. Candidates and issues will now be defined by the broader speech of others, whether from the mass media or independent expenders, rather than by their own speech, with inevitable resulting distortions.

Overall, therefore, the time-protection interest asserted by Vermont is non-compelling and in a variety of ways is affirmatively offensive to the First Amendment.

B. The Record Does Not Support a Significant Danger of Improper Time Allocation by Candidates and Office Holders.

As for the evidence allegedly supporting the time-protection interest, aside from some self-serving statements

by incumbents, 382 F.3d at 122-23, little evidence demonstrates that the caps would in fact reduce time spent on fundraising or that such time would be shifted to more valuable uses. At best the evidence might suggest an *opportunity* for such shifts, but missing is any evidence that time is actually diverted from official duties or "superior" speech. Thus, there is no evidence that candidates who spent and raised less money put their time to more valuable uses, either on official duties or on preferred modes of speech. Nor is there evidence that candidates in the past, when spending was supposedly lower, spent more time on preferred activities. Likewise, there is no evidence that in the few years that voluntary spending caps were followed there was any beneficial effect. And the eventual abandonment of those voluntary caps would at least suggest that candidates did not believe that they had better alternative uses for their time. The fact that there are numerous means to test and prove Vermont's hypothesis regarding the relation between candidate spending and candidate time allocation, yet there is no evidence from such available tests, strongly undermines the self-interested claims of incumbents that Vermont chooses to rely upon instead.

The dearth of evidence that the harms perceived and the benefits claimed are real, not mere conjecture, means that the State has failed to establish a compelling interest sufficient to justify its radical restriction on speech.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Second Circuit finding Vermont's alleged interests compelling and remanding for further consideration should be reversed, the interests should be found non-compelling, and Act 64's candidate expenditure limits should be declared unconstitutional.

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Respectfully Submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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